

STATE OF MAINE
SUPREME JUDICIAL COURT

AMENDMENTS TO THE
MAINE RULES OF EVIDENCE

2008 Me. Rules 10

Effective: August 1, 2008

All of the Justices concurring therein, the following amendments to the Maine Rules of Evidence, are hereby adopted to be effective August 1, 2008.

The specific rules amendments are set forth below. To aid in understanding of the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending the amendment, but the Advisory Note is not part of the amendment adopted by the Court.

1. The Maine Rules of Evidence are amended to add Rule 413, to read as follows:

RULE 413. PROTECTION OF PRIVACY IN COURT PROCEEDINGS

a) Evidence of the identity, address, employment or location of any person shall be inadmissible if such person requests the exclusion of such evidence and:

1) the court is notified that there is a court order in effect that prohibits contact between such person and another person, or

2) it is alleged under oath, orally or in writing, that such person's health, safety or liberty would be jeopardized by the disclosure of such information, and the court determines that disclosure of such information would

jeopardize such person as alleged
unless the court finds that such evidence is of a material fact essential to the
determination of the proceeding.

b) The court shall conduct all proceedings to determine the admissibility of
evidence under this rule in a manner so as not to disclose the information sought to
be excluded, unless the court finds that a party's right to due process and a fair
hearing would be violated if the information is not disclosed.

c) If the court determines that information otherwise inadmissible under this
Rule must be admitted as evidence of a material fact essential to the determination
of the proceedings, the court shall receive the such evidence *in camera*. In child
protective proceedings pursuant to Title 22 MRS such evidence shall be received
in camera and outside the presence of any person subject to a court order (section
1(a) above) or constituting a risk of health, safety or liberty (section 1(b) above)
and that person's attorney.

c) Persons who may object to the admission of evidence under this rule
include parties to the proceeding, their attorneys, a guardian ad litem, any person
called as a witness, a juror, and any person, who, although not a witness or party, is
a subject of the proceeding such as a child or a protected person.

Advisory Committee Note

Rule 413 implements the legislative directive of 4 M.R.S. § 8-B and 22 M.R.S. § 4007(1A) enacted by Chapter 351 of the Public Laws of 2007. The Rule makes evidence of the identity, employment, address, or location of any person inadmissible when there is alleged to be a court order in existence prohibiting contact between that person and another person, or when the court determines that disclosure of the identifying information might jeopardize the person's health, safety, or liberty, unless the court finds that the evidence is necessary to determine the issues in the proceeding.

The court is required to conduct proceedings to determine admissibility under the rule in such a manner so as not to disclose the information at issue unless such disclosure is necessary as a matter of due process.

Even if the court determines that the evidence should be admitted as necessary to determine an issue in the proceeding, the information is to be received in camera, and, in the case of child protective proceedings, outside the presence of the party or person from whom harm is feared, and outside the presence of his or her attorney.

Objection may be raised under this rule by parties, witnesses, their attorneys, and other persons affected by the proceedings.

Further prohibitions on disclosure, recordkeeping, etc. are the province of others.

2. Rule 503 of the Maine Rules of Evidence is amended to read as follows:

**RULE 503. ~~PHYSICIAN AND PSYCHOTHERAPIST-HEALTH CARE~~
PROFESSIONAL, MENTAL HEALTH PROFESSIONAL, AND LICENSED
COUNSELING PROFESSIONAL-PATIENT PRIVILEGE**

- (a) **Definitions.** As used in this rule:

(1) A “patient” is a person who consults or is examined or interviewed by a ~~physician or psychotherapist~~ health care professional, a mental health professional, or a licensed counseling professional.

(2) A ~~“physician” is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.~~ A “health care professional” is (A) a person authorized to practice as a physician; (B) a person licensed as a physician’s assistant; or (C) a licensed nurse practitioner, under the laws of the State of Maine or under substantially similar laws of any other state or nation, while engaged in the practice of the health care profession for which he or she is licensed.

(3) A ~~“psychotherapist” is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or,~~ A “mental health professional” is (A) a health care professional while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction; (B) a person licensed or certified as a

psychologist or psychological examiner under the laws of the State of Maine or under substantially similar laws of any state or nation, while similarly engaged; or (C) a person licensed as a clinical social worker, under the laws of the State of Maine or under substantially similar laws of any other state or nation, while similarly engaged.

(4) A “licensed counseling professional” is (A) “licensed professional counselor;” (B) a “licensed clinical professional counselor;” (C) a “licensed marriage and family therapist;” or (D) a “licensed pastoral counselor” licensed to diagnose and treat mental health disorders, intra-personal and interpersonal problems or other dysfunctional behavior of a social and spiritual nature under 32 M.R.S. § 13858 or under substantially similar laws of any other state or nation, while so engaged.

~~(4)~~(5) A communication is “confidential” if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the ~~physician or psychotherapist,~~

health care professional, mental health professional, or licensed counseling professional, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's ~~physician or psychotherapist~~, health care professional, mental health professional, or licensed counseling professional, and persons who are participating in the diagnosis or treatment under the direction of ~~the physician or psychotherapist~~, said professionals, including members of the patient's family.

(c) Privilege of accused. When an examination of the mental condition of an accused in a criminal proceeding is ordered by the court for the purpose of determining criminal responsibility, the accused has a privilege to refuse to disclose and to prevent any other person from disclosing any communication concerning the offense charged, made in the course of the examination.

(d) Who may claim the privilege. The privilege may be claimed by the

patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient. The person who was the ~~physician or psychotherapist,~~ health care professional, mental health professional, or licensed counseling professional at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(e) Exceptions.

(1) *Proceedings for hospitalization.* There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the ~~psychotherapist~~ health care professional, mental health professional, or licensed counseling professional in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by order of court.* Except as otherwise provided in subdivision (c), if the court orders an examination of the physical, mental or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders

otherwise.

(3) *Condition an element of claim or defense.* There is no privilege under this rule as to communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient, or of any party claiming, through or under the patient or because of the patient's condition, or claiming as a beneficiary of the patient, through a contract to which the patient is or was a party, or after the patient's death, in any proceeding in which any party puts the condition in issue.

Advisory Committee Note

This amendment would expand the coverage of the physician-psychotherapist privilege in Rule 503 to include communications between certain described mental health professionals and their patients or clients.

When various pre-existing, common-law, and statutory privileges were codified in the Rules of Evidence in 1975, the Advisory Committee and the Maine Supreme Judicial Court followed the lead of the original United States Supreme Court version of the Federal Rules of Evidence and took a relatively conservative view of the scope of the physician-psychotherapist privilege. Maine Evidence Rule 503 as originally adopted limited the evidentiary privilege to communications to or from licensed physicians (or persons reasonably believed to be such) and licensed psychologists and psychological examiners. Although then, as now, a wide variety of counseling and mental health professionals treated and consulted with clients and patients on a confidential basis, coverage of the privilege was deliberately kept relatively narrow, largely out of a concern that a broader definition might lead to evidentiary unavailability of statements rendered in a

variety of situations that could be characterized as counseling or therapeutic in one way or another.

This does not mean that there has been no protection of confidentiality for patients and mental health professionals. In many cases the statutes under which different groups of mental health professionals or counselors are licensed have imposed duties of confidentiality and have established statutory privileges for members of the licensed groups. In many cases these statutory privileges authorize disclosure by court order when necessary for the sound administration of justice.

Over the three decades since original promulgation of the Rules of Evidence the number and scope of activity of many different kinds of mental health professionals and counselors have greatly increased. There has been a frequent and often insistent call for stronger protection of the relationships of these therapists and counselors to their patients in the form of extension of the statutory privilege.

The impetus toward extension of the psychotherapist privilege beyond the traditional holders was increased by the Supreme Court decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996). There the Supreme Court ruled as a matter of federal common law of evidence that communications between a clinical social worker and her patient were absolutely privileged from disclosure despite their likely relevance to the issues in a civil action. The Supreme Court applied the absolute privilege despite the existence of conditional protection under the laws of the state under which the social worker was licensed.

Today evidence rules, statutes, and common law among the American jurisdictions vary widely in the scope of the psychotherapist privilege, although it appears that the trend is toward a more expansive privilege in terms of mental health and counseling professionals covered. The Uniform Rules of Evidence have been recently amended in 1999 to include an alternative proposal extending the psychotherapist privilege to a “mental health provider,” namely “a person licensed or reasonably believed by the patient so to be while engaged in the diagnosis or treatment of a mental or emotional condition including alcohol or drug addiction.”

The pressure for increased coverage appears to be coming mainly from two groups: (1) various clinical social workers and licensed mental health professionals who provide therapy for mental or emotional disease including drug and alcohol addiction; (2) a broader group of professional counselors who provide various

kinds of counseling services, but who do not necessarily treat mental or emotional diseases or addictions.

The proposed amendment would extend the absolute evidentiary privilege to licensed nurse practitioners and licensed physician's assistants when treating patients. The privilege would also encompass licensed clinical social workers when treating emotional and mental conditions and four defined classes of licensed counseling professionals, "licensed professional counselors," "licensed clinical professional counselors," "licensed marriage and family therapists," and "licensed pastoral counselors," when performing their counseling functions. Valid and complete licensure would be a prerequisite for the privilege.

Clinical social workers are licensed under 32 M.R.S. §§ 7051 et seq. Of the various kinds of social workers covered by state licensing requirements, those designated and licensed as "clinical social workers" seem best to fit the traditional role of psychotherapist as contemplated by the privilege. *See Jaffee v. Redmond, supra.*

The licensed counseling professionals proposed to be covered by the privilege are now licensed under 32 M.R.S. §§ 13851 et seq. These licensed counselors provide different forms of psychotherapy in at least some circumstances. Such professionals are currently covered by a conditional privilege which permits disclosure of client communications "when a court in the exercise of sound discretion determines the disclosure necessary to the proper administration of justice." 32 M.R.S. § 13862. The rule does not cover professionals not licensed but referred to in 32 M.R.S. § 13856.

This proposal does not cover communications to and by unlicensed mental health professionals and counselors or by persons licensed to provide specialized counseling, such as guidance counseling. The Committee is of the view that a generic definition that is not tied to some kind of clear requirement of state licensure would make the privilege administratively unworkable. For the same reason the Committee has not recommended that the privilege attach to persons "reasonably believed to be" licensed clinical social workers or licensed counselors. The privilege would extend to persons not licensed in Maine, but licensed in analogous categories with substantially similar legal requirements by other states or nations.

5. These amendments are effective August 1, 2008.

Dated: July 7, 2008

/s/
LEIGH I. SAUFLEY
Chief Justice

/s/
ROBERT W. CLIFFORD
Associate Justice

/s/
DONALD G. ALEXANDER
Associate Justice

/s/
JON D. LEVY
Associate Justice

/s/
WARREN M. SILVER
Associate Justice

/s/
ANDREW M. MEAD
Associate Justice

/s/
ELLEN A. GORMAN
Associate Justice